

STATE OF IOWA  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

STEVE BARNES,  
Complainant,

and

AFSCME IOWA COUNCIL 61,  
Respondent.

CASE NO. 8762

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PROPOSED DECISION AND ORDER

Complainant Steve Barnes filed this prohibited practice complaint with the Public Employment Relations Board (PERB) pursuant to Iowa Code section 20.11 and PERB rule 621-3.1(20). The complaint alleges that Respondent AFSCME Council 61 (AFSCME) committed a prohibited practice by failing to fairly represent Barnes in a dispute with his employer, the Des Moines Independent Community School District (the District). AFSCME has denied its commission of a prohibited practice.

Pursuant to notice, an evidentiary hearing on the complaint was held before me in Des Moines, Iowa on November 24, 2014. Barnes was self-represented and AFSCME was represented by attorney Mark T. Hedberg.

Based upon the entirety of the record, and having heard and considered the parties' arguments, I have concluded that Barnes has failed to establish AFSCME's commission of a prohibited practice.

FINDINGS OF FACT

Barnes is employed within a bargaining unit of the District's employees represented for purposes of collective bargaining by AFSCME Local 2048, an affiliate of Respondent AFSCME. The unit is composed of employees in various classifications in the District's transportation, operations, and food services

departments, and although it is not entirely clear from the record, it appears Barnes is employed as an operations engineer, chief (Class 8).

Barnes has been an active AFSCME member and supporter since soon after Local 2048's certification as the unit's representative in 1975. He has served at various times as an officer of Local 2048, as a member of AFSCME's executive board, and as an AFSCME member of a joint labor-management committee. At the time of the events central to this case, Barnes was Local 2048's vice president.

The collective bargaining agreement between Local 2048 and the District contains a four-step grievance procedure which culminates with binding arbitration. On July 20, 2011, Barnes filed a grievance pursuant to the contractual procedure concerning the manner in which a vacant preventive maintenance engineer position had been filled by the District. Barnes' grievance alleged that the District violated the contract's seniority and transfer procedure provisions when he "did not receive interview passed over for position while grievant is as and/or more qualified for the [preventive maintenance] position."

Following the denial of Barnes' grievance at the first and second steps of the grievance procedure, a third-step meeting was conducted with Bill Good, the District's chief operations officer. Barnes was present, as were AFSCME staff representative Rick Eilander, Local 2048 president Urasaline Frith and Local 2048 chief steward Sharon Bell. On September 27, 2011, Good issued a written answer which denied the grievance on the basis that the established screening process for the preventive maintenance applicants had been followed and that Barnes had not met or exceeded the qualifications of the applicants who had

received interviews.

Internal AFSCME procedures applicable to its affiliated locals provide for the review and evaluation of grievances not resolved at the pre-arbitration steps by the AFSCME staff representative involved. Should the staff rep think the grievance should be withdrawn without arbitration, he or she may initiate AFSCME's "10-day letter" procedure. This process involves notice to the employee grievant that the grievance will be withdrawn unless the employee seeks further review of the matter within 10 days by appealing the proposed withdrawal. Such an appeal triggers a review "hearing" by a grievance appeal panel of other AFSCME staff reps followed by a review by AFSCME's president, who is vested with final decision-making authority on whether the grievance will be arbitrated or withdrawn.

As is his normal practice following the issuance of a third-step grievance denial, AFSCME representative Eilander reexamined the contractual provisions Barnes felt had been violated. Eilander thought Barnes' appointment to the vacant position would be a promotion, rather than a lateral transfer, and that because the collective agreement allowed management to "consider the needs of the District and each applicant's qualifications," it essentially allowed the District to hire the applicant it thought most qualified for the position. Even if deemed a transfer, rather than a promotion, Eilander saw that the collective agreement required the District to consider an applicant's departmental seniority only if the applicants had "relatively equal qualifications." He concluded that Barnes' grievance was not winnable at arbitration, recalling that he had previously lost transfer grievances based upon "better transfer language" than was present in

the Local 2048 contract.

The grievance procedure set out in the collective agreement provided that following a step 3 response the employee and union could formally request arbitration within 14 days. The agreement did not, however, establish a deadline for the conduct of the arbitration itself.

Although he did not think he could prevail at an arbitration of Barnes' grievance, Eilander knew that requesting arbitration was necessary in order to preserve the option, and that requesting arbitration did not mean that the request could not be withdrawn later. Eilander wanted to "hang on to" Barnes' grievance, thinking that if it was kept alive he might be able to use it to pressure the District into giving Barnes the position should another promotion or transfer opportunity later arise. Consequently, on September 29, 2011, Eilander made a timely request for the arbitration of Barnes' grievance and obtained a list of qualified grievance arbitrators from PERB in accordance with the contractual procedure.

Eilander spoke with Barnes about the grievance and, while expressing his belief that it was not winnable at arbitration, explained his strategy of keeping it alive in order to potentially gain leverage for Barnes' application should another promotion or transfer opportunity arise.<sup>1</sup>

Sometime during 2012, when staff changes occurred at AFSCME, Eilander's responsibilities were altered such that he no longer serviced Local 2048, which became the responsibility of another AFSCME representative.

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<sup>1</sup> Although a part of Barnes' cross examination of Eilander was seemingly intended to dispute Eilander's testimony concerning his communication with Barnes, Barnes did not testify at hearing and Eilander's testimony in this regard is uncontroverted.

Approximately a year later, the duties of at least some AFSCME staff were again shuffled as a result of staff changes at AFSCME, and Eilander was again assigned to service Local 2048. Although he had commonly encountered Barnes at meetings attended by officers of AFSCME locals, Barnes had never confronted Eilander with a demand that something be done with his grievance or expressed confusion about its status.

AFSCME leadership became aware that a backlog of unresolved grievances, including some filed through Local 2048, had developed. AFSCME staff representatives were directed to review all pending grievances and to initiate AFSCME's 10-day letter procedure to close those deemed to be without merit.

Eilander reviewed the pending Local 2048 grievances, including Barnes' transfer grievance and a second one he had filed in late 2011, which Eilander had also preserved for possible arbitration. Eilander still thought that neither was winnable in arbitration, and that their preservation would not be of benefit because the District would likely not view them as potential liabilities due to events which had occurred since their filing. He consequently began AFSCME's 10-day letter process as to both grievances.

In accordance with AFSCME's established procedures, Eilander prepared and submitted "10-day letter justification" memos to AFSCME's office in early January, 2014. In support of his recommendation that Barnes' transfer grievance be withdrawn, Eilander's memo explained:

The contract does not guarantee an employee a transfer or a interview, and does have language that allows the employer the discretion to hire who they deem the most qualified. Minus language in the contract and given the current language on transfers and promotions I do not believe this grievance is winnable in arbitration.

Eilander's justification memo triggered the issuance of a January 15, 2014 certified letter to Barnes from AFSCME's grievance coordinator. That letter, mailed to the Des Moines address Barnes had listed on his grievance, advised that his grievance would be withdrawn and that no further action would be taken on it unless he completed and filed an enclosed form appealing the anticipated withdrawal within 10 days. Barnes completed and filed the form with AFSCME in a timely fashion, indicating he did not believe the grievance should be withdrawn.

The day after Barnes' appeal was received, AFSCME's grievance coordinator mailed a certified letter to him at the address used previously, advising him that a hearing would be held on his transfer grievance (as well as on his other pending grievance, which had also been the subject of a 10-day letter and appeal) on February 6, 2014 at AFSCME's Des Moines office. The letter advised Barnes of his right to appear and participate in person or by telephone and to be represented, and directed that he inform the grievance coordinator of whether he would participate and if so, whether in person or by telephone.

At some point prior to the commencement of a February 6 appeal panel hearing, AFSCME learned that Barnes' address had changed and that he had not received its January letter notifying him of the hearing. In response, on February 6, 2014, the grievance coordinator prepared and mailed another certified letter, this time to Barnes' new address, which rescheduled the hearing on his appeals for March 6, 2014.

On March 6, an AFSCME grievance appeal panel composed of staff

representatives Greg Lewis and Matt Butler assembled in AFSCME's Des Moines office for the scheduled hearing. Neither had been involved in the filing, processing or evaluation of the grievances to be considered. AFSCME's grievance coordinator had informed Lewis and Butler that Barnes would appear in person, but he had not arrived by the scheduled starting time of 1:00 p.m. Lewis and Butler attempted to contact Barnes by telephone at 1:12 p.m. and again at 1:28 p.m., but neither call was answered.

The appeal panel proceeded with its review of the grievances in Barnes' absence, examining the documentation created throughout the entirety of the grievance process and the language of the collective bargaining agreement in question, as well as a number of transfer/promotion cases from AFSCME's internal grievance database. Lewis and Butler felt that the applicable contract language allowed the District to fill job vacancies with the applicant it deemed most qualified, and that Barnes' grievance was thus not winnable in arbitration. In accordance with established procedure, the panel prepared and submitted a summary of the proceeding and of its conclusions.

Following issuance of the appeal panel's summary, Danny Homan, AFSCME president since 2005, discussed Barnes' grievance(s) with the members of the panel and reviewed all the assembled documentation, including the contract's language, Eilander's justification memo and the appeal panel's summary and conclusion. Homan, himself a former AFSCME staff representative with broad experience in the negotiation and enforcement of public sector collective bargaining agreements, also thought that the contract did not require vacancies be filled by current employees on a seniority basis, but

instead allowed the District to fill a position on the basis of its evaluation of the qualifications of the applicants. He consequently concurred with Eilander and the appeal panel that the grievances were not winnable in arbitration. Accordingly, on March 24, 2014, Homan sent a certified letter to Barnes advising him of AFSCME's final decision to not proceed to arbitration on either of the grievances and to withdraw them from the process.

Barnes' complaint in this case, which addresses only AFSCME's actions in connection with his earlier transfer grievance, was filed with PERB on April 15, 2014.

#### CONCLUSIONS OF LAW

Although never citing any specific provision of the statute, a clear thrust of Barnes' complaint is that AFSCME breached its duty to fairly represent him by holding his grievance without action on it for more than two years until it was ultimately disposed of in 2014. And while not plead or argued with specificity, at times he seems to also suggest AFSCME's refusal to arbitrate the grievance also breached its duty of fair representation, regardless of the timing of its ultimate decision.

A certified employee organization bears a "duty of fair representation" imposed by Iowa Code section 20.17(1) which provides, in relevant part:

1. The employee organization certified as the bargaining representative shall be the exclusive representative of all public employees in the bargaining unit and shall represent all public employees fairly. . . . To sustain a claim that a certified employee organization has committed a prohibited practice by breaching its duty of fair representation, a public employee must establish by a preponderance of the evidence action or inaction by the organization which was arbitrary, discriminatory or in bad faith.

A breach of the employee organization's section 20.17(1) duty of fair representation constitutes a prohibited practice within the meaning of Iowa Code section 20.10(3)(a), which provides:

3. It shall be a prohibited practice for public employees or an employee organization or for any person, union or organization or their agents to:
  - a. Interfere with, restrain, coerce or harass any public employee with respect to any of the employee's rights under this chapter or in order to prevent or discourage the employee's exercise of any such right, including, without limitation, all rights under section 20.8.

*See, e.g., Elahi and AFSCME Iowa Council 61, 14 PERB 8663; Kunzman and Teamsters Local 828, 05 PERB 6602; O'Hara and AFSCME/Iowa Council 61, 02 PERB 5532.* Accordingly, in order to establish the commission of a prohibited practice in this case, Barnes bore the burden of showing that AFSCME acted in a manner which was arbitrary, discriminatory or in bad faith.

The Iowa Supreme Court has discussed that nature of "arbitrary" conduct in the context of a fair representation case:

A union behaves arbitrarily toward an aggrieved union member if it ignores a meritorious grievance for no apparent reason or processes it with only perfunctory attention.

...

Arbitrary action has been defined as a "willful and unreasonable action, without consideration and in disregard of the facts or circumstances of the case."

*Norton v. Adair County, 441 N.W.2d 347, 358 (Iowa 1989). See also Air Line Pilots v. O'Neill, 499 U.S. 65 (1991).*

In unfair representation claims, discriminatory action occurs when the

certified representative unjustifiably treats the complainant(s) in a manner different from others in the represented bargaining unit, such as by utilizing a different procedure or decision-making process in the handling of a grievance. *See, e.g., Elahi*, 14 PERB 8663; *Kunzman*, 05 PERB 6602.

In order to establish “bad faith,” there must be evidence of fraud, deceitful action, or dishonest conduct by the union. *See Schmidt v. International Brotherhood of Electrical Workers, Local 949*, 980 F.2d 1167 (8th Cir. 1992), *O’Hara*, 02 PERB 5532.

Here, the record does not support a conclusion that either AFSCME’s decision not to arbitrate Barnes’ grievance or its failure to push the grievance to some kind of resolution until early 2014 was arbitrary, discriminatory or in bad faith.

Eilander had attended the third-step meeting and understood the facts involved with Barnes’ grievance. He reviewed the contract provisions which were relevant to it as well as the District’s responses and explanations at the pre-arbitration steps of the grievance procedure. Based upon this information, as well as his prior experience with promotion/transfer grievances, he formed the opinion that Barnes’ was not winnable at arbitration. Although he did not think the grievance had merit, he preserved the ability to advance it to arbitration in the hope that keeping it alive might influence future action by the District which would be favorable to Barnes. Eilander told Barnes what he was doing with the grievance and why, and never received a complaint or expression of confusion about its status from him.

Barnes’ grievance languished without action from late September, 2011

until late 2013, when Council 61 realized a backlog of grievances had developed and directed its staff representatives to review all pending grievances and take appropriate action. Eilander, recently reassigned to again provide staff representative services to Local 2048, revisited the pending grievances which had originated with Local 2048, concluded that holding Barnes' grievance had not and would not serve any further purpose and, believing it to be without merit, commenced the 10-day appeal procedure for it and a number of other pending grievances. The grievance appeal panel and (ultimately) Homan also concluded that the grievance was not winnable at arbitration, but only after reviewing the grievance, the applicable contract language and the District's earlier responses.

AFSCME's systematic consideration of the merits of Barnes' grievance, in three separate reviews, is the antithesis of the perfunctory grievance processing which amounts to arbitrary action by a certified employee organization. The question is not whether AFSCME's assessment of the merits of Barnes' grievance was correct or not. Even if its interpretation of the collective agreement's provisions was in error, the burden of showing a breach of the duty of fair representation involves more than demonstrating mere errors in judgment. *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976); *O'Hara*, 02 PERB 5532.

There is nothing in the record which would establish that AFSCME's actions in connection with Barnes and his grievance were discriminatory. Eilander attended and represented Barnes at the third-step grievance meeting with the District and evaluated his grievance the same way as others filed by AFSCME-represented employees. It is clear that AFSCME followed its established procedures in the 10-day appeal process commenced by Eilander's

eventual recommendation that the grievance be dropped. Nor is there anything of record which establishes that AFSCME engaged in any sort of fraudulent, deceitful or dishonest conduct with respect to Barnes which would support a conclusion that it acted in bad faith.

The duty of fair representation does not require perfect representation. *See, e.g., Ross and AFSCME Council 61*, 85 PERB 2562; *Daystrom and Iowa United Professionals*, 95 PERB 4611. Mere negligence, without more, does not constitute a breach of the duty of fair representation. *Steelworkers v. Rawson*, 495 U.S. 362 (1990); *O'Hara*, 02 PERB 5532. While Barnes suggests, without real evidentiary support, that he was left in the dark about his grievance, the worst that can be said on this record is that Eilander may have been able to more clearly communicate his evaluation of the grievance's merits and his strategy to Barnes, and that AFSCME could have more closely monitored his and the other backlogged grievances and disposed of them more promptly. But these arguable shortcomings fall far short of arbitrary, discriminatory or bad faith conduct, and can be fairly viewed as, at worst, merely negligent.

Based upon Eilander's systematic evaluation of the merits of Barnes' grievance, and the subsequent reviews by the grievance appeal panel and Homan (coupled with the absence of any discriminatory or bad faith action by anyone involved), AFSCME would not have breached its duty of fair representation had it commenced the 10-day appeal process and dropped the grievance following the District's third-step response in September, 2011.

Eilander's strategy of keeping the grievance alive in hopes that it might contribute to later District action which was favorable to Barnes was conscious

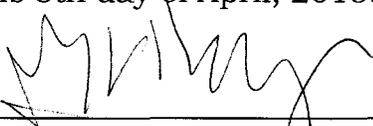
and calculated, rather than arbitrary, and has not been shown to have been discriminatory or in bad faith. While not disposing of the matter when it first became apparent that the District did not view the grievance as a potential liability might well be viewed as inattentive to Barnes' apparent (yet seemingly unexpressed) desire for a more-prompt final resolution, or even negligent, it did not affect the eventual disposition of the grievance or prejudice any of Barnes' substantive rights.

Barnes having failed to establish action by AFSCME which was arbitrary, discriminatory or in bad faith, I propose the following:

ORDER

Barnes' prohibited practice complaint is hereby DISMISSED.

DATED at Des Moines, Iowa, this 8th day of April, 2015.



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Jan V. Berry  
Administrative Law Judge

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